DISCUSSION PAPER
ON
POSSIBLE CHANGES TO LEGISLATION AFFECTING MANITOBANS LIVING WITH A MENTAL DISABILITY

Review Committee
Examining Legislation Affecting
Manitobans Living With a Mental Disability

September 1991

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SPECIAL NOTE TO READERS

Throughout this Discussion Paper, specific questions are asked to which the Review Committee invites your response. Space for responses and comments is provided at the bottom of pages where these questions appear. A completed Discussion Paper could be returned to the office of the Review Committee or be used as the basis for a written submission to the Review Committee at 470 - 125 Garry Street, Winnipeg, Manitoba, R3C 3P2, by November 1, 1991.

1. INTRODUCTION

A. Review Committee's Structure, Mandate and Timeframe

Based on a review of recommendations from the April, 1991, consultation process on possible revisions to Part II of The Mental Health Act, the Government decided to establish a Review Committee to develop recommendations on new legislation affecting adult Manitobans living with a mental disability.

The Review Committee is comprised of members from the community and the Government. The Committee is chaired by an independent consultant, Gail Watson. The deputy chair is John Sinclair, Winnipeg lawyer and chair of the Maitland B. Steinkopf Residences.

Other community members on the Committee are Moira Grahame, past president of the Canadian Association for the Mentally Retarded (now ACL-Manitoba) and the Autistic Society of Manitoba; Vicki Burns, director of DASCH-Direct Action in Support of Community Homes Inc. and past chair of the Manitoba Coalition of Service Providers; and Allister Gunson, a Winnipeg lawyer and vice-president of the Association for Community Living-Manitoba. The Government members include Tannis Mindell, Martin Billinkoff and Karen Roblin of the Department of Family Services, and Joanna Knowlton of the Public Trustee's office.

The mandate of the Committee is to develop options and recommendations on new legislation affecting adult Manitobans living with a mental disability as vulnerable persons. The intent is to provide provisions for protection and an enabling framework for services.

The Review Committee began its meetings in early June 1991, and is expected to forward its final recommendations to the Minister of Family Services by November 15, 1991.

B. Outline of the Consultation Process

The review process will take place in three stages:

1) Stage 1 -
   Review and deliberation by the Review Committee leading to the preparation of this Discussion Paper for distribution for public consideration and comment in September, 1991.

2) Stage 2 -
   i) A televised information program on the Review Committee's proposed recommendations to be aired via the Manitoba Satellite Network in 21 locations throughout the Province, on October 9, 1991, from 7:00 to 8:30 p.m.

   ii) Consultation by the Review Committee with interested parties, resulting in the formulation of final recommendations to the Minister by November 15, 1991.

   These consultations will take the form of meetings between the Review Committee and interested groups and individuals, as well as the receipt of written submissions.

3) Stage 3 -
   Preparation of legislation by the Government and the introduction of a bill in the Legislature by Spring 1992.

C. Current Manitoba Legislation & Services

The Mental Health Act, Part II, provides the legislative basis for the Government of Manitoba to make orders to place persons with a mental disability under supervision or in an institution.

Under section 32 of the Act, the provincial Director of Psychiatric Services, or a designate of the Director, can issue an "order of supervision." This "order" is issued on the basis of a doctor's examination and the consent of a parent or guardian.

A judge can also make an "order" that a person with a mental disability be placed in an institution or under the care of a custodian.

A person under an "order" no longer has the legal right to make decisions affecting such things as his or her body, place of residence, or management of finances. That decision-making authority is reassigned by the Act or the Court to someone who is then referred to as the "committee" of the person with the mental disability.

Under the Act, the Public Trustee becomes the committee of the person and of the estate of that person if no other committee exists. The Court may appoint a private individual, for example, a parent, as committee of the estate, but not as committee of the person.

The types of social services available through the Department of Family Services specifically or primarily for Manitobans living with a mental disability include institutional care, community residences, day programs, and vocational rehabilitation services. These services are provided either by departmental regional staff or by external agencies which receive funds from the department.

The legislation which currently addresses some of these services to persons with disabilities is The Social Services Administration Act. This Act authorizes the Minister of Family Services to "provide social services and develop programs of social services." These services are defined as including rehabilitation services, case work, counselling, assessment and referral services. The Act also authorizes procedures for the licensing of residential care facilities and the appeal process for licensing procedures.

The provision of services is not mandatory; the Act is permissive in the sense that certain services may be made available. There is no legislation establishing or governing the operation of the three residential institutions which serve persons living with a mental disability.

D. Major Issues

A number of issues and concerns with the current provisions of Part II of The Mental Health Act and the services available to persons living with a mental disability have become apparent to the Review Committee, both through its discussions as well as through previous submissions to the Department of Family Services. The major issues with the current legislation and services are summarized as follows:

- the Act combines persons with a mental disability and persons who are mentally ill in one Act;
- the Act uses outdated terminology (such as "mental retardate", "inmate", "institution"), and has not been substantially amended for many decades;

- the definition of a "mental retardate" assumes that persons with a mental disability require protection and does not recognize them as citizens with rights and abilities;
- the present legislation takes away from those persons with a mental disability who are under an order of supervision or in an institution all rights to make decisions with respect to their property and their person;
- there is no provision for the person who is the subject of the proceedings to be involved in the proceedings;
- the Act focuses on control rather than protection and support (i.e., punitive in nature);
- there are arbitrary powers for the Director to detain and transfer persons who are under orders of supervision or in institutions ("as he sees fit");
- there are no effective notice, appeal or review provisions for orders of supervision;
- there are no provisions for representation by counsel or an advocate;
- the Act does not contain provisions for persons who are competent with respect to making some types of decisions but not others;
- it is difficult and costly for parents or friends to become a person's "committee";
- only the Public Trustee can be designated as committee of "the person";
- the Act deprives persons under orders of supervision or custodianship or in institutions of the right to consent to medical treatment;
- the Act allows any person under an order of supervision to also be placed and detained in an institution;
- it assumes parents have the authority to consent to an order of supervision/institutionalization on behalf of their adult mentally disabled offspring; and
- many services are provided without a clear legislative foundation and do not have an appeal process.

II. PROPOSED NEW LEGISLATION

A. STATEMENT OF PRINCIPLES

The Review Committee has developed the following principles to shape its recommendations and the suggested legislative approach:

Principle #1: **SELF-DETERMINATION**	All adults have the right to self-determination as reflected in the Canadian Charter of Rights and Freedoms. Rights, freedoms and dignity shall be respected and protected under the laws of Manitoba. Every citizen of the Province has the right to freedom of expression, freedom of association, the right to life, liberty and security of the person, and the right to equal protection and equal benefit both before and under the law.
Principle #2: **PRESUMPTION OF CAPACITY**	All adults have the right to make decisions affecting themselves with their choice of support from family, friends and advocates, thereby ensuring respect for the legal presumption of capacity.
Principle #3: **ENABLED/EMPOWERED TO MAKE DECISIONS**	All adults should be enabled to make decisions. Where an individual requires personal support in making a decision, the form of that support can be the advice, advocacy, support and affection of family and friends chosen or pre-designated by the adult. All adults shall be given the opportunity to express themselves in an individual way and to the fullest extent possible.
Principle #4: **FOCUS ON INDIVIDUAL'S ABILITY**	Every effort should be made to determine the individual's decisions and to enhance individual choice, with the support of family and friends chosen by the person.
Principle #5: **THE LEAST RESTRICTIVE AND INTRUSIVE ALTERNATIVE**	Any intervention by the law in the decision-making process of an adult shall be the least restrictive and intrusive form of support, assistance or protection.

Principle #6: **SUPPORTED DECISION-MAKING**	Where support is necessary in making decisions, the model of inter-dependent decision-making through the advice, support and affection of family and friends chosen by the individual shall be recognized and validated.
Principle #7: **RESPECT FOR PRIOR DECLARATIONS**	Any prior indication by a person in writing in advance of the appointment of a substitute decision-maker shall always be respected, except where to do so is impossible or would place the individual at risk.
Principle #8: **SUBSTITUTE DECISION-MAKING**	In order to respect and preserve the legal rights of adults, any legislative or legal response that establishes a substitute decision-making process shall only be invoked as a last resort and it must be based on evidence that the current practise is no longer empowering the adult.
Principle #9: **INDIVIDUAL ASSESSMENT**	Assessments which are made to determine a person's need for a substitute decision-making process shall be personalized, comprehensive, and involve those who are important to that person's life.
Principle #10: **SUPPORTS AND SERVICES**	A high priority of Government should be to provide individuals in need with support and services which allow for independence, realization of capabilities and self-determination. Supports and services provided by Government should be conferred in a manner which minimizes legal interventions and upholds an individual's rights to self-determination and participation.

Q. Are there additional principles addressing specific areas which you would recommend be included?

Comments or Other Questions?

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B. DEFINITION OF "MENTAL DISABILITY"

The Review Committee has discussed the definition of "mental disability" to be utilized in new legislation at length. It has reviewed definitions used in legislation in other jurisdiction.

The Review Committee has concluded that new legislation will need to define who will be eligible for the supports and services outlined in that legislation. It has also attempted to develop a working definition which emphasizes a person's needs.

The Review Committee recommends the use of the term "mental disability" in order to be consistent with the terminology of the Canadian Charter of Rights and Freedoms and the Manitoba Human Rights Code.

Accordingly, the Review Committee recommends that new legislation be based on the following definition:

> "mentally disabled person" means an adult who, due to intellectual impairment manifested prior to the age of 18 years, requires supports to meet basic needs regarding his or her health care, personal care, or property and financial affairs."

A statement would need to be added in the legislation that this definition does not include those with an intellectual impairment due exclusively to a mental illness.

Q. Would you recommend another term, such as "mental handicap", be used instead of "mental disability"?
Q. Is the proposed definition appropriate?

Comments or Other Questions?

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C. PROPOSED RECOMMENDATIONS

Based on the Statement of Principles, the Review Committee has developed a number of proposed recommendations regarding legislation and services affecting Manitobans living with a mental disability. These proposed recommendations are set out in this section together with a number of specific questions which reflect some of the Committee's discussions and where community responses would be appreciated.

1. **A NEW ACT**

   The Review Committee proposes that Part II of The Mental Health Act be replaced with new legislation.

2. **AREAS FOR LEGISLATION**

   The Review Committee supports the idea of new legislation in the following categories:

   - Substitute Decision-Making
   - Support Services
   - Protection.

3. **OTHER ACTS**

   In addition to new legislation in these three areas, the Committee is aware that 40 - 50 other existing Manitoba Acts may have provisions which do not meet the principles endorsed by the Review Committee, and accordingly should be reviewed further. Many of the amendments would involve primarily the terminology used in those statutes.

4. **SUPPORTED DECISION-MAKING**

   The Review Committee discussed in detail the idea of "supported decision-making". This term refers to the assistance an adult would receive to make decisions, rather than appointing another person to make decisions on his/her behalf. The Review Committee strongly endorses the concept of supported decision-making as an informal and natural way of ensuring that adults have the ability to exercise their rights.

Q. Do you support the concept of supported decision-making?

Comments or Other Questions?
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However, the Review Committee felt that legislation governing supported decision-making would unduly interfere with the operation of natural networks. It recommends instead that the importance and priority of supported decision-making be recognized in legislation and that services be established to assist in the development and operation of informal natural support networks.

Q. Should supported decision-making be regulated and monitored by legislation?
Q. Should there be a voluntary registry for supported decision-making?

5. ADVOCACY

The Review Committee discussed at length the concept of formal advocates being a part of new legislation affecting persons with a mental disability. The Committee understood the term "advocate" to refer to a person who has some knowledge and expertise which serve to assist an adult in understanding and expressing his/her rights.

As in the case of supported decision-making, the Committee does not recommend specific legislation to introduce a formal system of advocacy in Manitoba. The Committee reached this conclusion because it felt that a formal, structured approach to advocacy would undermine much of the natural and informal advocacy which now exists and which should be encouraged further.

Comments or Other Questions?

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6. RIGHT TO AN ADVOCATE

The Committee endorses the right of adults to choose to involve an advocate on their behalf whenever their rights may be affected. The advocate may be an informal voluntary arrangement, a person from an advocacy organization, or a lawyer. The right to an advocate could be acknowledged in other components of the new legislation to be recommended by the Review Committee.

The Committee also recognizes that there may be instances when the Department of Family Services should contract with an external organization to provide advocacy services when an individual may not have a support system and could benefit from advocacy.

Q. What should be the main role of an advocate?
Q. Under what circumstances should the government pay for an advocate?

7. SUBSTITUTE DECISION-MAKING

The Review Committee proposes that new legislation for "substitute decision-making" should replace the "committee" or "guardian" concept. The details of a substitute decision-making system are outlined in this section.

a) <u>What is Substitute Decision-Making</u>?

"Substitute decision-making" occurs when the decision-making rights of an adult are either given up or taken away and exercised on their behalf by another person for specific decision-making areas and for defined periods of time. As such, it should be an intervention of last resort. Great care must be taken to define who is eligible for this intervention, under what circumstances it would be used, and how it would be implemented.

Q. Do you support the concept of a SDM as an alternative to "orders of supervision"?

Comments or Other Questions?
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b) When Should a Substitute Decision-Maker be Appointed?

Substitute decision-making should only be a possibility when an adult is at risk and there is some question about his/her capacity to make competent decisions about her/his person or property in order to alleviate the risk.

In order to appoint a substitute decision-maker (or SDM) the following five conditions must be met:

(i) the adult is in need of decisions being made involving themselves or their property;
(ii) their natural support networks and other less intrusive means are not working or are insufficient to meet their needs;
(iii) they cannot manage on their own;
(iv) there is a likelihood of either deterioration in or failure to improve their health, personal or financial circumstances; and
(v) a SDM is a reasonable remedy.

c) Who Should be Appointed A SDM?

An adult person's family member or friend would be the first choice to be appointed as a SDM for all or some of the decisions affecting the person or property, for various specified periods of time. All such appointments should be subject both to a maximum time limit and to regular review.

The Public Trustee would be involved as a SDM only where other more natural alternatives are unable or unwilling to serve.

Q. Should a SDM be appointed for a time-limited period?

Comments or Other Questions?

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d) What Authority Would a SDM Have?

The SDM would have the authority to make certain specified decisions on a person's behalf. The SDM would be required to make every effort to determine the adult's wishes in a particular situation and to act accordingly, unless it would not be in the adult's best interests to do so.

SDMs could be appointed to make decisions in the areas of:

- health care,
- personal care, or
- property and financial affairs.

SDM appointments would be specified in one or more of these three areas; the appointing body would be able to combine categories or specify sub-categories of decision making. The relationship between the SDM and the adult would be one of a fiduciary obligation, that is, the same as between a trustee and the beneficiary of the trust.

Certain limits would be set on the types of decisions a SDM could make. For example, a SDM appointed to make personal decisions could not institute divorce proceedings unless specific authority to do so was contained in the order of appointment.

Other types of decisions, such as voting, consent to marriage or making a will could never be made by the SDM. The adult would retain the right to make these decisions personally, subject always to tests of capacity contained in specific legislation or common law.

A third category of decision could not be made either by or on behalf of a person who has had a SDM appointed to make personal decisions. These decisions would include consent to the adoption of the adult's child and consent to non-therapeutic sterilization. In the case of adoption, a decision must be made by a court. For non-therapeutic sterilization, the Supreme Court has ruled that courts do not have this authority in the absence of specific legislation which addresses this issue.

The new legislation would need to give direction to the SDM as to how substitute decisions are expected to be made. The Review Committee supports the following order of priority for decisions:

- decisions must be made according to the adult's expressed or demonstrated wishes;
- if these wishes are not known or cannot be determined, decisions must be made in a manner consistent with the adult's values, beliefs and wishes; or
- if neither the expressed wishes nor values and beliefs can be determined, decisions must be made in the adult's best interests.

Q. Should a SDM be appointed for only specified areas or for all decisions affecting either the person or the estate?

e) What Assessment is Required?

A SDM could only be appointed after a comprehensive formal assessment of the adult's needs and capacity. An adult's right to be involved in the assessment, together with their family, friends and advocate, and to be advised of the assessment process, outcomes, and appeal procedures would be contained in the law.

In the assessment process, an adult would be presumed to be competent and able to give consent and instructions. They would have the right to refuse to be assessed, unless it is court ordered.

Comments or Other Questions?

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f) Who Could Initiate an Assessment?

An Assessment could be requested by any person who believes that an adult may be at risk and may benefit from a SDM being appointed. The request could originate from an adult's family, friends, support network, advocate or a social worker or other professionals who are familiar with the adult's needs.

g) What Rights are Safeguarded in an Assessment?

The individual who is being assessed must have their rights preserved throughout the assessment process. Consistent with the principles supported by the Review Committee, these rights include:

- the right to be informed in advance, and to refuse to be assessed without a court order;
- the right to be present throughout and have others of their choice also present;
- the right to be informed of the assessment results and their consequences;
- the right to be assessed in their own language; and
- the right to appeal.

h) Who Conducts the Assessment?

An Assessment Panel of at least three persons would conduct the assessment. The Panel membership would include a lawyer, a representative of an advocacy organization, and a parent of a person with a mental disability. They would receive information from those who live with or who have pertinent knowledge of the adult who is being assessed.

The Panel would be required to meet the individual who is being assessed within two weeks of the request and to make recommendations within 48 hours of holding a hearing. Evidence to the Panel would be primarily oral, with no conclusion made on the basis of affidavits alone.

Q. Is the composition of the suggested Assessment Panel appropriate?

i) What Would be the Scope of the Assessment?

The Assessment Panel would focus on the aspects of an adult's life where help in decision-making may be required (i.e., one or more of: personal decision-making, property and financial affairs, or health care). The Panel would determine whether the adult is aware of his/her unmet needs, the alternatives available, whether she/he can express and remember a stable choice, and whether he/she can understand the risks and benefits of their decisions.

The assessment could determine that an adult is incapable of making decisions affecting their health, safety or well-being. In such cases, a SDM may be the most appropriate mechanism to ensure that these critical decisions are made on the adult's behalf.

The SDM legislation would specify that the Panel should recommend a SDM only for the areas where help in making decisions is required and only for the length of time necessary to make those decisions.

The assessment could also determine who is best able to act as a SDM on a person's behalf.

Q. Is it appropriate for the Assessment Panel to focus on the immediate needs or should the assessment address all health, personal and financial needs?

Comments or Other Questions?

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j) Who Appoints and Monitors the SDM?

The Review Committee recommends that a new position of Commissioner be created. This Commissioner would have the responsibility to oversee the SDM process, including appointing the Assessment Panel, receiving its recommendations, and appointing and monitoring a SDM in uncontested situations. Where the SDM appointment is contested, the Commissioner would take the application to court for a decision.

The Commissioner would bring an independence to the SDM process by not being involved in the service system and by not being a SDM.

Q. Do you support the idea of a Commissioner appointing SDMs?
Q. How can a SDM best be monitored to ensure the decisions taken are appropriate?

k) How Will the Commissioner's Office Operate?

The Review Committee proposes that the Commissioner responsible for the operation of the SDM legislation be appointed by Cabinet and be accountable to the Minister of Family Services. The Commissioner should file an annual report which would be tabled in the Legislature. The Ombudsman would be able to review the operations of the Commissioner's Office.

The Commissioner would appoint three person Assessment Panels from a roster of a minimum of twelve individuals with regional representation. Each panel would include a lawyer, a representative of an advocacy organization, and a parent of a person with a mental disability.

Comments or Other Questions?

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The major duties of the Commissioner's Office would be:

- to receive and manage the process for applications regarding persons who may require substitute decision-making;
- to ensure that options for supported decision-making and other alternatives to avoid or reduce the need for a SDM have been fully explored;
- to appoint an interim SDM in urgent situations;
- to appoint a three-person Assessment Panel, from the roster;
- to issue notice to relevant participants;
- to ensure an advocate is involved if the adult wishes;
- to approve, reject or modify a Panel's recommendations, including recommendations regarding the ongoing SDM;
- to ensure that appropriate and thorough attempts to ascertain the adult's wishes have been made, and that the Panel's recommendations incorporate those wishes;
- to refer contested SDM appointments to court;
- to issue final notices to all parties to advise of the outcome, right to appeal, appeal procedures and time frames;
- to initiate the scheduled re-assessments or requested re-assessments;
- to receive and investigate complaints about SDMs; and
- to establish and maintain a registry of private SDMs.

Q. Do you agree with the proposed authority and duties of the Commissioner's Office?

Comments or Other Questions?

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1) <u>Can an Interim SDM be Appointed for Emergency Situations</u>?

The Review Committee discussed ways in which an adult at risk could have decisions made on his/her behalf when there may not be enough time available for the Commissioner to initiate an assessment and determine who could be the best SDM for specific decisions.

The Committee has concluded that under very limited emergency circumstances, an "Interim Substitute Decision-Maker" could be appointed by the Commissioner for up to 30 days. Normally, the Interim SDM would be the Public Trustee, since the Commissioner would not have enough time to be satisfied that a private SDM is suitable. However, the Commissioner would also have the authority to appoint a private person as Interim SDM if it was appropriate.

In order to appoint an Interim SDM, the Commissioner would need to have reasonable grounds to believe that:

a) the person with a mental disability is at risk of abuse, neglect or self-neglect;
b) prompt action is required to protect the person from serious adverse effects; and
c) decisions need to be made which the person at risk may not be capable of making.

If an Interim SDM is needed for more than 30 days, the Commissioner could approve one extension of up to 15 days, but would need to apply to court for any further extension.

Q. Do the proposed emergency procedures enable us to deal with emergencies while safeguarding the principle of the least intrusive intervention?

Comments or Other Questions?

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m) What Would be the Notice, Review and Appeal Procedures?

Prior to any assessment, the affected adult and his/her family, support network and advocate would be formally notified that an assessment is being considered. This notification would describe the assessment process and time frames, and indicate how an interested person can participate in or contest the assessment or appeal any subsequent SDM appointments. Similarly, the adult and his/her family and support network would be formally notified prior to the final appointment of a SDM.

The appointment of a SDM could be appealed to court. The Commissioner would be required to monitor the role of SDMs and to initiate regular reviews prior to their renewal. Any person could request a review of the SDM by the Commissioner at any time.

n) When Would the Courts be Involved?

The Review Committee is proposing a system which can remain as natural, informal and supportive as possible. It believes that adults at risk should be able to receive help without the necessity and the cost of applications to court.

However, there are certain instances where either access to a court or the involvement of the court is necessary in order to ensure that the adult's rights are protected. These situations include:

- where the SDM appointment is contested;
- appeal of the Commissioner's decisions; and

Q. Should the courts be involved in other situations?
Q. Do you agree that all new institutional placements should be court ordered?

Comments or Other Questions?
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- where institutionalization is requested by a SDM; the SDM would be required in these cases to demonstrate that an institutional placement is in the adult's best interests.

o) <u>What Happens with Existing Orders of Supervision?</u>

The new legislation proposed by the Review Committee would apply to new situations. However, the existing "orders of supervision," affecting approximately 1500 people, would need to be phased out. The Committee proposes that new legislation provide for a five-year transition period during which the existing orders would continue to be valid. During this period, an application could be made to the Commissioner by or on behalf of the person under the order of supervision for a determination that the order be cancelled immediately, OR for an Assessment Panel to consider the need for a SDM to be appointed under the new legislation. At the end of the five years, an existing order of supervision would cease to have effect.

For those who resided in an institution prior to the new legislation coming into effect, the SDM would be allowed to decide to continue the institutional placement if the SDM's recommendation is agreed to by an Assessment Panel and the Commissioner. Contested decisions could be appealed to court.

Q. Do you agree with these suggestions for the phasing out of the 1500 existing orders of supervision?

Comments or Other Questions?

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Note The three Charts contained in the Appendix illustrate the proposed process for the application and assessment procedures leading to the appointment of a substitute decision-maker. Reference to these charts may assist in understanding how the various components of the proposed process would work in practice.

8. SUPPORT SERVICES

In addition to the need to develop new legislation to address the decision-making needs of adults living with a mental disability, the principles developed by the Review Committee endorse that a range of support services be available to individuals if they are to truly be in a position of exercising their rights. The following section outlines the essential components of legislation in this area.

a) What are Support Services?

"Support services" include a range of community-based services which could be available to help persons living with a mental disability to live and actively participate in the community.

The Review Committee recommends that the operating principles which would guide these services be in legislation and that requirements for providing services be included in the legislation. However, due to the rapidly evolving nature of the service system, legislation should not provide a detailed set of definitions or operating procedures for these services, but instead should identify the broad types or categories of services which could be provided.

b) What Types of Services Would be Included?

The range and types of support services which could be provided would be those included in the existing Social Services Administration Act - (i.e., assistance, rehabilitation services, case work, and community development), as well as additional types of services, including services related to

places to live in the community, services related to places to work and employment options, and services in support of families and personal support networks.

c) What Operating Principles Would Guide Support Services?

The general principles endorsed by the Review Committee in Section II of this Discussion Paper would apply to all activities relating to persons living with a mental disability. In order to ensure that these principles have an impact on support services, the Review Committee proposes the following operating principles:

i) Consistent with the principles of self-determination, presumption of capacity and empowerment, legislation regarding support services should specify that persons living with a mental disability have the opportunity and the right to:

- lead satisfying, productive lives in their communities and be contributing members of society;
- make their own decisions, with community support if necessary, and direct their own lives; and
- make choices and take risks that they and/or their network of support deem appropriate.

ii) Consistent with the principles of the least restrictive and intrusive alternatives and the need for supports and services, legislation regarding support services should specify that persons living with a mental disability have the opportunity and the right to:

- use the same services that are available to everyone else in society with adaptation and support where necessary;
- maintain family bonds, and to develop friendships and relationships that are a normal part of living in the community; and

- receive supportive services that emphasize individualized, non-segregated, and community-based approaches.

iii) Consistent with the principle of respect for due process, legislation regarding support services should specify that persons living with a mental disability have the opportunity and the right to:

- receive advance notice of proposed actions which have the potential of affecting their ability to live in the community; to participate in decisions affecting them; and to appeal any decisions affecting their rights to independent authorities.

Q. Are there additional support service principles which should be added?

d) How Would Needs Be Met?

The Review Committee recommends that in order for a person's rights to be respected and needs to be met, certain expectations or service requirements should be established which would apply whenever a person receives support services. These requirements would be in the legislation and include:

i) individual plans (IP) - to allow for the planning process for all individuals receiving services. The purpose of the IP would be to require a process for accessing the services needed by an adult in one or more aspects of his/her life.

Comments or Other Questions?

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The IP process would ensure that self-determination is respected by actively involving the individual. The importance of supported decision-making and advocacy would be acknowledged. There would be specific requirements regarding the adult's rights:

- to be present and to have a friend, family member, or advocate present with them;
- to be informed in advance about the IP process; and
- to be informed of the outcomes of the IP and their consequences.

Q. Who should be involved in the development of an individual plan?

ii) mediation process - to allow for a third party to review and attempt to resolve service plans where there is lack of consensus in the IP process, provisions for mediation services would be made.

iii) appeal process - to allow for an independent appeal body (such as the Social Services Advisory Committee appointed under The Social Services Administration Act) to hear appeals regarding the administration of support services.

Q. Are there any additional steps necessary when there is a lack of consensus in the individual plans?

Comments or Other Questions?

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9. PROTECTION

The Review Committee concluded that legislation must be developed to provide protection, support and assistance for adults with a mental disability who require assistance in protecting themselves from abuse, neglect or self-neglect.

a) What are the Guiding Principles?

The legislation must set out guiding principles, and every procedure in the legislation must be applied in conjunction with these guiding principles.

i) An adult has a right to self-determination and the right to have his or her person, estate and rights protected, even though the adult may not be capable of expressing his or her wishes.

ii) The paramount consideration in any intervention contemplated by the Act is the adult's expressed wishes. If these are not known, the intervention must be consistent with the adult's values and beliefs. If these are not known, any intervention must be in the adult's best interests.

iii) An adult is entitled to live in a manner he or she wishes, and may accept or refuse assistance, as long as it can be determined that it is the adult's conscious and informed choice, and does not cause harm to others.

iv) Any intervention taken under this Act must be designed for the specific needs of the adult. The intervention must be limited in scope, and subject to review and revision as the adult's situation changes.

v) Any action taken under this Act must be provided in a timely manner and must be designed to preserve and maintain the dignity of the adult.

vi) Any adult who is unable to look after himself or herself deserves the necessary care and attention that is most effective and yet least intrusive or restrictive in nature.

vii) Where the Criminal Code is applicable, the appropriate action must be taken.

Q. Should there be legislation that enables intervention on behalf of adults who are mentally disabled and at risk of abuse or neglect?
Q. Are these guiding principles sufficient to ensure adults are protected?

b) <u>What Should the Legislation Address?</u>

The legislation must address:

i) a response to reports of abuse, neglect and self-neglect;

ii) a process for investigation of abuse, neglect or self-neglect;

iii) authority to assess an adult's capability to make decisions;

iv) provisions for support, assistance and advocacy;

v) a process to authorize appropriate access and interventions in emergency situations; and

vi) due process procedures reflecting the values, rights and freedoms enshrined in the Charter of Rights and Freedoms.

Q. Should the legislation authorize peace officers to enter premises to investigate reported abuse and neglect?

Comments or Other Questions? _____ _____ _____

c) What is Meant by Abuse, Neglect or Self-Neglect?

i) Abuse:

"Abuse" means the mistreatment, whether physical, sexual, mental, emotional, financial, the withholding of or the improper use of medication, the violation of rights, or any combination of these, which causes or may cause an adult physical or psychological harm, loss of the adult's rights, or loss to the adult's estate.

ii) Neglect

"Neglect" may be intentional or due to ignorance and means any action or lack of action which results in a failure to provide necessary care, assistance, guidance or attention of an adult, resulting in a) physical or psychological harm or b) loss to the adult's estate.

iii) Self-Neglect

"Self-neglect" means a failure or inaction on the part of an adult, the probable result of which puts the adult or any other person in a life threatening situation. Self-neglect also means an action or a failure to act on the part of an adult, which would result in the loss or non-realization of necessary resources.

d) What Will be the Process for Reporting Abuse?

i) Reporting of abuse, neglect or self-neglect occurring in the home and community, although voluntary, shall be encouraged. Reports may be made to the Department of Family Services.

ii) Government staff or service providers must report incidents of abuse, neglect, or self-neglect which comes to their attention.

iii) There shall be a reporting process for voluntary and for mandatory reporting of abuse, neglect and self-neglect. The reporting process shall be accessible, known and simple.

iv) There shall be legal protection for persons reporting in good faith suspected abuse or neglect.

Q. Should reporting of suspected abuse or neglect be voluntary or mandatory?
Q. To whom should the suspected abuse or neglect be reported?
Q. Should there be protection for the individual who reports in good faith suspected abuse?

e) <u>What Will be the Nature of Intervention?</u>

All reports will be investigated. If there is evidence of abuse or neglect, determination would be made as to 1) the adult's capability to protect himself or herself from the abuse/neglect/self-neglect and 2) the degree of help, support, assistance, advocacy or intervention, the adult needs in order to end the abuse/neglect/self-neglect.

Upon intervention, the adult will be informed that he or she has the right to request an individual advocate who will support and assist him or her through the investigation and the resolution.

There is a wide range of possible intervention options that might be suitable, depending on the circumstances: provision of services, support and assistance, injunctions against an abuser, removal of abuser, freezing bank accounts and assets, removal of the adult from the situation, and placement of the adult in a place of safety.

Comments or Other Questions?
_____
_____
_____

A plan must be put into place by the Case Worker, to ensure coordination and delivery of services, and ensure the case is traced to resolution. This plan will be provided to persons who are pertinent to the adult, including family, friends or an advocate.

Where the Criminal Code is applicable, the appropriate action must be taken. Government policy should be reviewed and, where necessary, revised to ensure that access, intervention and justice are facilitated. Educational measures should be undertaken to ensure implementation of guidelines and policies in this regard.

Q. Are there other issues which you feel have not been addressed?

Q. Do you have any other general comments?

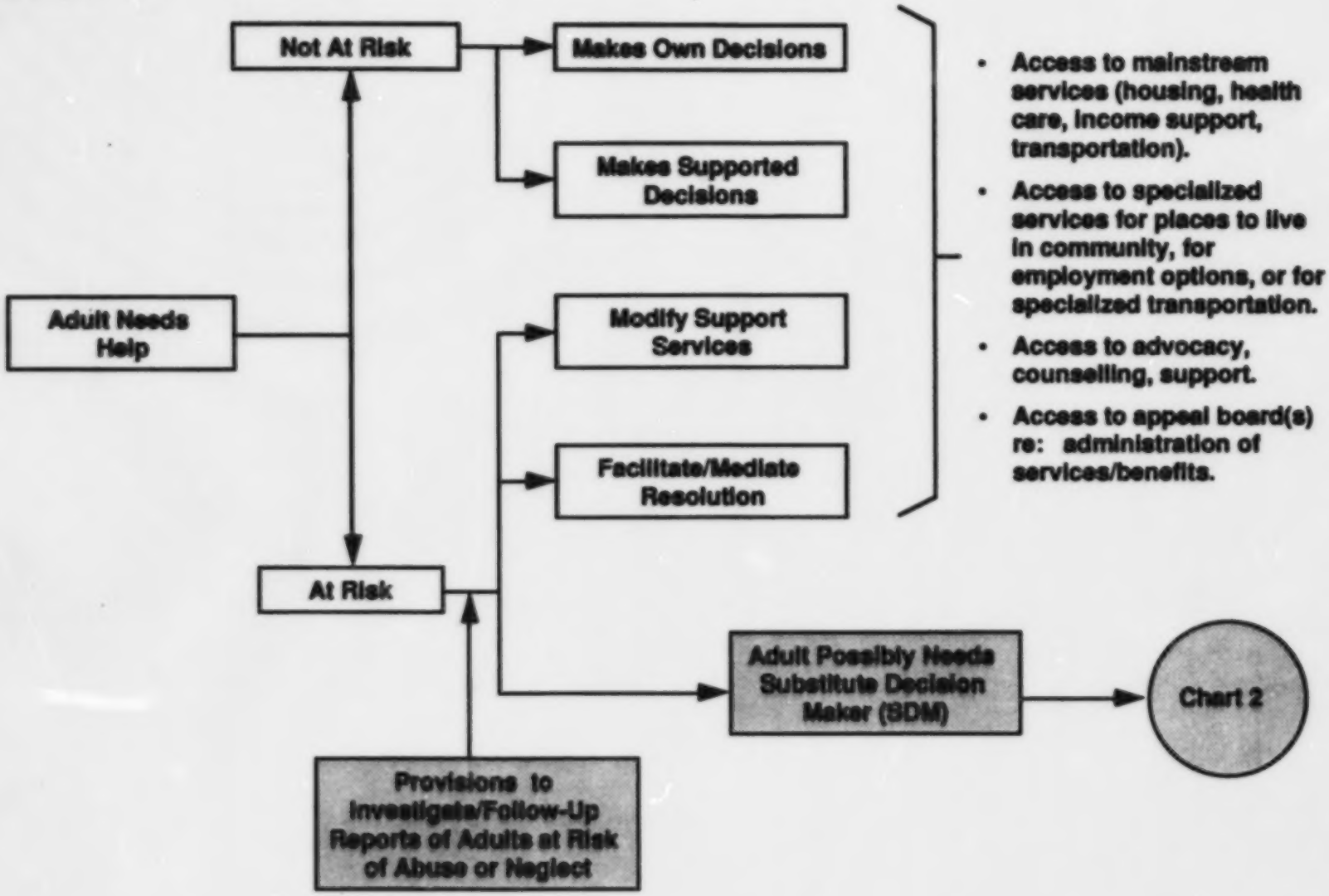
Comments

Appendix

Charts to Illustrate
the Proposed
Substitute Decision Making Process

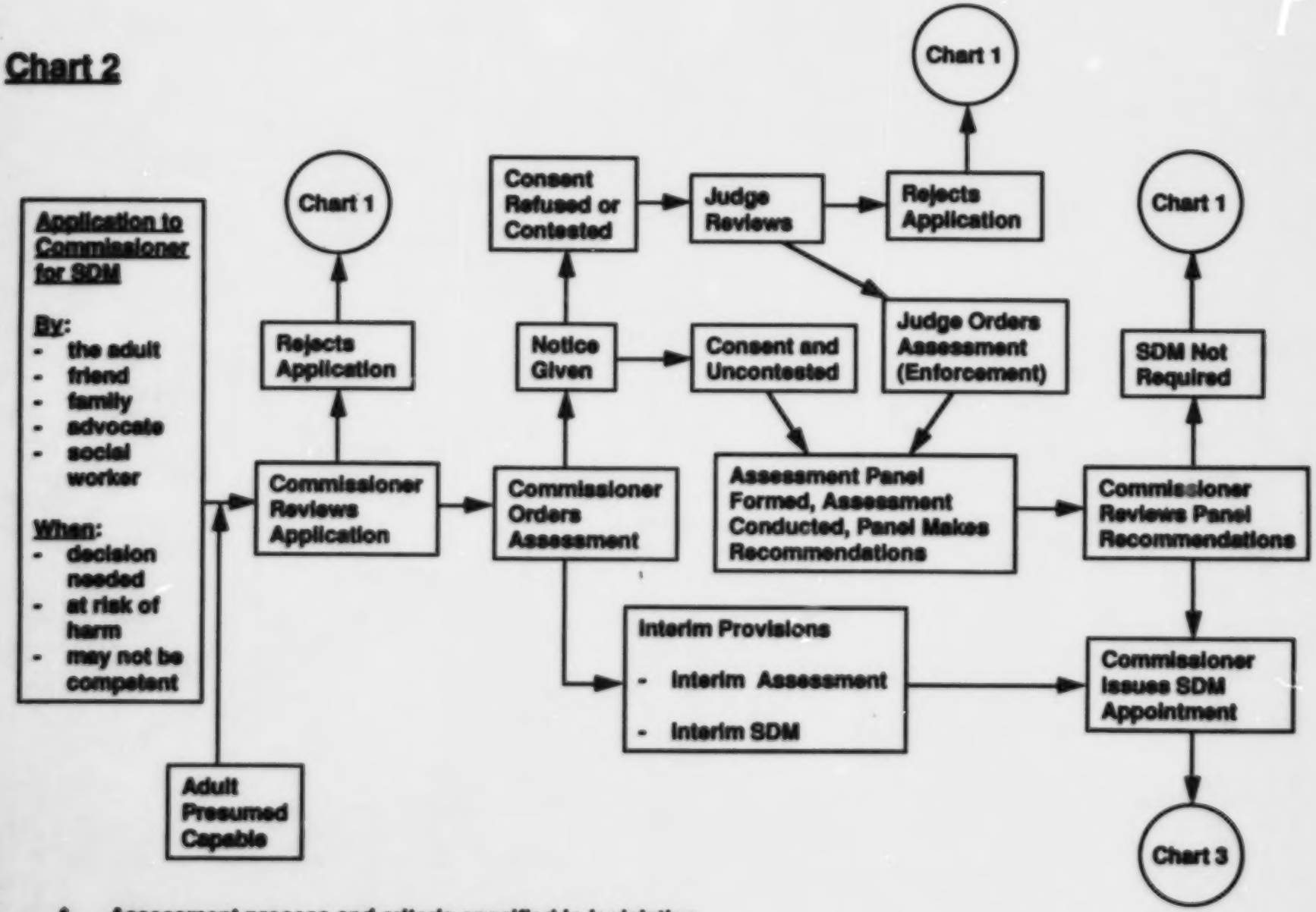
The Proposed Substitute Decision-Making Process

Chart 1


Not At Risk
Makes Own Decisions
Makes Supported Decisions
Adult Needs Help
Modify Support Services
Facilitate/Mediate Resolution
At Risk
Adult Possibly Needs Substitute Decision Maker (SDM)
Chart 2
Provisions to Investigate/Follow-Up Reports of Adults at Risk of Abuse or Neglect
• Access to mainstream services (housing, health care, income support, transportation).
• Access to specialized services for places to live in community, for employment options, or for specialized transportation.
• Access to advocacy, counselling, support.
• Access to appeal board(s) re: administration of services/benefits.

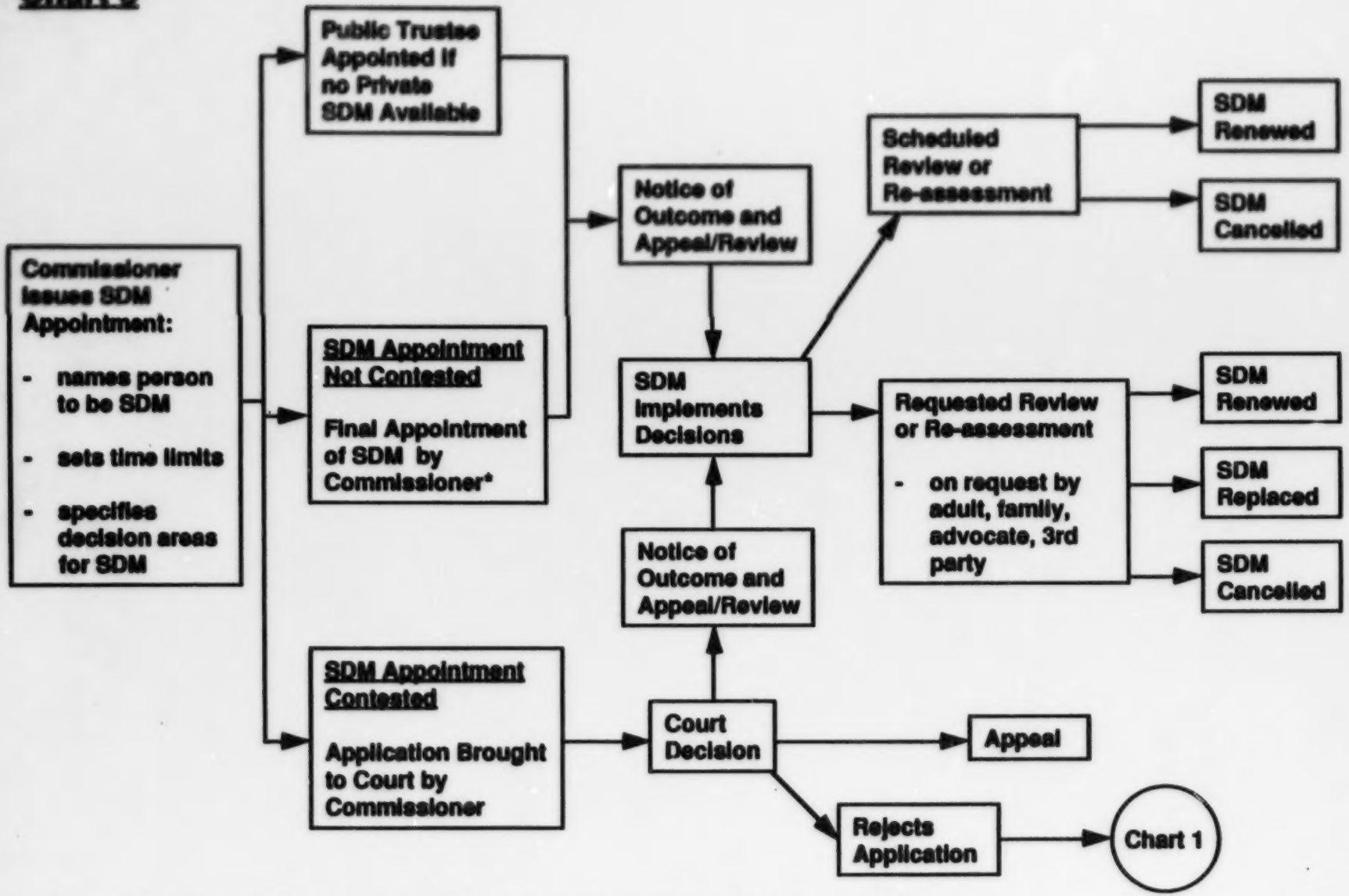
Subject to SDM Legislation

Chart 2



- Assessment process and criteria specified in legislation

Chart 3



* Legislation specifies who is eligible to be SDM, duties, and limits to decisions.